

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DAVID J. VEGA**

Claimant

VS.

**EXIDE TECHNOLOGIES**

Self-Insured Respondent

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Docket No. 1,006,097

**ORDER**

Claimant appealed the September 22, 2004 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on March 1, 2005.

**APPEARANCES**

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Dustin J. Denning of Salina, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

Claimant alleges he sustained a series of mini-traumas, which injured both shoulders, working for respondent. The parties stipulated June 28, 2001, was the appropriate date of accident for this claim. In the September 22, 2004 Award, Judge Moore determined claimant sustained permanent injury to his left shoulder but that claimant failed to prove he sustained permanent injury to his right shoulder. Consequently, the Judge awarded claimant permanent disability benefits under K.S.A. 44-510d for a 13.5 percent disability to the left upper extremity at the shoulder level.

Claimant contends Judge Moore erred. Claimant argues he sustained permanent injury to both shoulders and, therefore, he should be awarded permanent disability benefits under K.S.A. 44-510e. Accordingly, claimant requests the Board to modify the Award by finding he has an 18 percent wage loss, a 44 percent task loss, and a 31 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Conversely, respondent contends the September 22, 2004 Award should be affirmed. Respondent argues claimant's right shoulder injury was only temporary as it completely resolved.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant is a long-time employee of respondent, having worked approximately 26 years for the battery manufacturer. The parties agree claimant injured both shoulders in a series of mini-traumas while performing the job of grid caster, which required claimant to lift lead parts with outstretched arms.

In either May or June 2001, claimant began experiencing symptoms in both shoulders, which he later reported to respondent. Respondent's physical therapy notes dated June 28, 2001, indicate claimant was experiencing bilateral shoulder pain, with the left hurting worse than the right, which was diagnosed as bilateral rotator cuff tendinitis. Those therapy notes also indicate claimant had a positive impingement sign in the right shoulder.

Respondent provided claimant with physical therapy and light duty. And the right shoulder improved more than the left. Claimant testified that although his right shoulder was much improved and "feeling pretty good"<sup>1</sup> after the initial round of physical therapy, it still ached.

Respondent's physical therapy notes were entered into the record by the parties' written stipulation. Those notes indicate claimant first saw respondent's physical therapist on June 28, 2001, and received an initial round of physical therapy for both shoulders through September 20, 2001. The September 20, 2001 therapy notes indicated claimant estimated he had achieved an 85 percent improvement in his shoulders but that he still had left shoulder complaints greater than the minor discomfort in his right shoulder.

Due to considerable ongoing left shoulder symptoms, respondent referred claimant to Dr. Gary L. Harbin for left shoulder treatment. Dr. Harbin saw claimant on November 14, 2001, and took a history that claimant's shoulders began bothering him in June 2001, upon changing job duties. During that initial evaluation, the doctor found full range of

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<sup>1</sup> R.H. Trans. at 15.

motion in both shoulders. And claimant did not complain of right shoulder pain during resisted range of motion testing. The doctor's November 14, 2001 notes read, in part:

Patient seen with the left shoulder injury. The patient noticed onset of pain approximately 6-28-01. States the pain comes and goes. . . . In June he switched jobs to a grid caster where he lifted 5-10# grids in front of him, slid them towards him, picked them up, rotated 180° and put them on a pallet behind him. Started having pain in the left shoulder, very mild on the right. He was put in some therapy and the right got better. The left has continued to bother him. He has been on light duty for 2½ months.<sup>2</sup>

Dr. Harbin requested an MRI to determine whether claimant had a left shoulder impingement or a torn rotator cuff. The MRI results indicated claimant had tendinitis of the rotator cuff instead of a tear.

In January 2002, Dr. Harbin injected claimant's left shoulder, which improved claimant's symptoms. At that appointment, claimant did not complain about his right shoulder.

Claimant had a second round of physical therapy, which ran from late December 2001 through mid-March 2002. The right shoulder is not mentioned in the related therapy notes.

Claimant attempted to return to his regular duties as a grid caster. But, according to claimant, within a few days both shoulders were aching, the left worse than the right, prompting claimant to return to Dr. Harbin.

Dr. Harbin last saw claimant on April 24, 2002. The doctor has offered to operate on claimant's left shoulder but has also recommended that claimant try and live with his pain. In June 2002, Dr. Harbin wrote respondent's claims analyst that claimant "should not do frequent (more than 30) repetitions per hour above shoulder level of any type of lifting or upper extremity usage of the involved arm."<sup>3</sup> Moreover, the doctor rated claimant as having a 12 percent functional impairment to the left upper extremity under the *AMA Guides* (4th ed.).<sup>4</sup>

The permanent work restrictions from Dr. Harbin prevented claimant from performing the grid caster job. Accordingly, respondent transferred claimant to a material

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<sup>2</sup> Harbin Depo., Ex. 2.

<sup>3</sup> *Id.*

<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.).

handler job, which required him to operate a fork lift and manually sort and lift boxes weighing up to and over 70 pounds.

Claimant testified that when Dr. Harbin released him he had a chronic ache in his right shoulder and more significant left shoulder symptoms. Claimant testified, in part:

Q. (Ms. Fisher) Okay. Tell me the problems you were having with the left shoulder at the point that Dr. Harbin released you.

A. (Claimant) That would have been about April of 2002. I still -- in an extended position I couldn't really exert any force, I couldn't hold hardly any weight in it. A lot of times, when it was really bad, just the weight of my shoulder and extended position would be enough just to make you drop it, you know, drop your arm down.

Q. And what was the right shoulder like?

A. The right shoulder, at that time it wasn't that bad. It was just that chronic, an ache, a lot like this one started out before I turned it in.<sup>5</sup>

But by the time claimant saw Dr. Edward J. Prostic in November 2002 to be evaluated for purposes of this claim, claimant's right shoulder had worsened but his left shoulder had remained about the same. Claimant attributed the worsening in the right shoulder to compensating for the left shoulder injury and to returning to regular work.

At claimant's attorney's request, claimant was examined by Dr. Prostic, who is a board-certified orthopedic surgeon. The doctor concluded claimant had tendinitis in both shoulders due to repetitive minor trauma he sustained at work. Dr. Prostic also determined claimant had sustained a six percent functional impairment to the right upper extremity and a 15 percent functional impairment to the left upper extremity, which combined for a 13 percent whole body functional impairment according to the *AMA Guides* (4th ed.).

Dr. Prostic reviewed a list of former work tasks prepared by claimant's vocational expert, Dick Santner. The doctor concluded claimant lost the ability to perform four of the nine work tasks (44 percent) claimant performed in the 15-year period before developing his present shoulder injuries.

According to Dr. Prostic, claimant's x-rays showed demineralization in both shoulders. But upon examination, the doctor found mild tenderness in the left shoulder anteriorly, but none in the right shoulder. Likewise, the doctor found crepitus in the left shoulder but none in the right. The doctor noted claimant had weakness of external rotation for the left shoulder but did not note such finding for the right shoulder. Finally, Dr.

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<sup>5</sup> R.H. Trans. at 18.

Prostic concluded claimant had mild anterior laxity in both shoulders. But according to the doctor, the AMA *Guides* do not consider laxity as constituting an impairment.

Moreover, claimant testified at the June 2004 regular hearing his left shoulder was still worse than the right but the right shoulder had worsened to the point it now also pops and catches.

After carefully considering Dr. Prostic's findings, Judge Moore concluded claimant had failed to prove that he had sustained a permanent impairment to his right shoulder. Considering the entire record and the parties' arguments, the Board affirms that finding. Accordingly, claimant should receive permanent disability benefits for an injury to the left shoulder under K.S.A. 44-510d. And the September 22, 2004 Award should be affirmed.

The Board adopts the Judge's findings and conclusions to the extent they are not inconsistent with the above.

**AWARD**

**WHEREFORE**, the Board affirms the September 22, 2004 Award entered by Judge Moore.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant  
Dustin J. Denning, Attorney for Respondent  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director